

Pohle, David

From: Metivier, Steven V LRB <Steven.V.Metivier@usace.army.mil>
Sent: Wednesday, March 02, 2016 1:59 PM
To: Pohle, David; Smith, Aaron C LRB; Crawford, Margaret A LRB
Subject: RE: Incomplete and insufficient EPA response re: Clean Water Act concerns at and around 13181 Martville Road, Martville, New York

Thanks.

-----Original Message-----

From: Pohle, David [mailto:Pohle.David@epa.gov]
Sent: Wednesday, March 02, 2016 1:36 PM
To: Smith, Aaron C LRB <Aaron.C.Smith@usace.army.mil>; Crawford, Margaret A LRB <Margaret.A.Crawford@usace.army.mil>; Metivier, Steven V LRB <Steven.V.Metivier@usace.army.mil>
Subject: [EXTERNAL] FW: Incomplete and insufficient EPA response re: Clean Water Act concerns at and around 13181 Martville Road, Martville, New York

Just an FYI since the District has been involved.

From: Fischer, Lauren
Sent: Wednesday, March 02, 2016 12:47 PM
To: Modigliani, Justine <Modigliani.Justine@epa.gov>; Pohle, David <Pohle.David@epa.gov>
Subject: FW: Incomplete and insufficient EPA response re: Clean Water Act concerns at and around 13181 Martville Road, Martville, New York

FYI

From: V. M. Fichera [mailto:vmfichera@gmail.com]
Sent: Wednesday, March 02, 2016 12:38 PM
To: Fischer, Lauren <Fischer.Lauren@epa.gov <mailto:Fischer.Lauren@epa.gov> >
Cc: McKenna, Douglas <McKenna.Douglas@epa.gov <mailto:McKenna.Douglas@epa.gov> >; Montella, Daniel <Montella.Daniel@epa.gov <mailto:Montella.Daniel@epa.gov> >; Richard Lippes <rlippes@lippeslaw.com <mailto:rlippes@lippeslaw.com> >; Enck, Judith <Enck.Judith@epa.gov <mailto:Enck.Judith@epa.gov> >; john.katkony24@mail.house.gov <mailto:john.katkony24@mail.house.gov> >; mike_lynch@schumer.senate.gov <mailto:mike_lynch@schumer.senate.gov>
Subject: Incomplete and insufficient EPA response re: Clean Water Act concerns at and around 13181 Martville Road, Martville, New York

Dear EPA Assistant Regional Counsel Fischer:

While I appreciate your forwarding the attached additional materials to me, the fact remains that the EPA's investigation remains incomplete and insufficient.

For example, the EPA appears to be asserting -- from non-governmental aerial imagery rather than from a necessary but omitted onsite inspection -- that there is no fill in the palustrine wetland. Even a perfunctory glance at the unofficially-sourced non-governmental image presented as "investigation" clearly demonstrates that a site visit was necessary because the tree coverage does not permit adequate visual inspection of the wetland area in the aerial photo. Indeed, the submission of such inadequate, non-governmental "data" actually insults the intelligence of this complainant.

Further, the EPA still has not addressed the USDA FSA aerial photographs submitted in support of the complaint which provide clear visual evidence that the area which was logged was heavily wooded and the resultant clearing could only have been achieved with grubbing disturbing the earth over an area of approximately nine acres. Additionally, the EPA has not addressed my submission of the written Phase IIB report of the archaeologist, as well as her photos in the report, on file with the DEC and the NYS Parks Department as part of the mining permit application.

The archaeologist states clearly that she had to avoid excavated root trunks to do her shovel tests, yet the EPA is stating that there was no disturbance of the earth, even while noting the vegetation covering the area. The submitted USDA FSA photos of the clearing show the density of the mid-successional trees which were left at the periphery and which also provide visual evidence of the prior heavily-wooded state of the area before grubbing. The drone photos submitted also contain images of the clustered root balls left by the grubbing machinery. Ironically, the EPA even goes so far as to use non-governmental public aerial photography to make an assertion about the coverage with grass which would only be possible if the earth had been disturbed by the grubbing which excavated roots to provide flattened fertile ground for vegetation. In short, the EPA has itself submitted evidence which contradicts its own assertions made in the email report and the CEI document.

However, I am appreciative for the following paragraph from the CEI:

At the time of the CEI, a mining permit had not yet been issued for the Site. The mining permit was approved subsequent to the CEI on September 8, 2015 (Permit ID 7-0556-00276). Activities authorized by the mining permit must be in strict conformance with plans approved by the NYSDEC on August 3, 2015, including, but not limited to the Mined Land Use Plan (dated April 2015) and the map titled, "Stormwater Control Plan Interim Condition" (dated July 28, 2015). These documents describe silt fencing and a 7-foot berm (with a minimum 14-foot base width) that must be installed 25 feet inside the perimeter of the LOM. Based on discussion with Mr. Ferlito, it is clear that he intends to contain all stormwater within the berm; however, there are no engineering calculations or other documentation demonstrating that the berm is adequately sized to prevent stormwater discharges from the mine during heavy rain events. In addition, the initial construction of the berm may result in a stormwater discharge associated with industrial and/or construction activity. [emphasis supplied]

In the paragraph cited above, the EPA has effectively documented that the DEC did not perform due diligence in the matter of the mining permit application review. Indeed, the DEC Regional administration had even refused my request that the state agency require a SPEDS permit of the applicant -- in short, no permit would ever have been required had this complaint not been filed with and at least partly investigated by the EPA.

In conclusion, I must dispute your early "closing" of this incomplete case file as a preemptive action, which appears calculated to cover up the lack of due diligence of the agency in its failure to conduct a site visit of the wetland pursuant to the complaint.

Please address the above-described outstanding issues and reply to me, Congressman Katko, and Senator Schumer in writing.

Thank you for your anticipated assistance in eventually ensuring due diligence on the part of the Federal agency.

Yours truly,

Dr. V. M. Fichera (PhD)

----- Forwarded message -----

From: Fischer, Lauren <Fischer.Lauren@epa.gov <mailto:Fischer.Lauren@epa.gov> >

Date: Wed, Mar 2, 2016 at 11:28 AM

Subject: Clean Water Act concerns at and around 13181 Martville Road, Martville, New York

To: "vmfichera@gmail.com <mailto:vmfichera@gmail.com> " <vmfichera@gmail.com <mailto:vmfichera@gmail.com> >

Attached, please find a letter that will also be sent today via certified mail along with the enclosures.

Lauren Fischer

Assistant Regional Counsel

U.S. Environmental Protection Agency Region 2

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New York, New York 10007-1866